Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1888

ORION RESEARCH INCORPORATED,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT

OF APPEALS FOR THE FIRST

CIRCUIT

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Petitioner, Orion Research Incorporated, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered on February 11, 1980.

OPINIONS BELOW

The opinions of the Court of Appeals for the First Circuit and the District Court for the District of Massachusetts are set forth in the Appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on February 11, 1980. This petition for certiorari was filed within 90 days of this date. Jurisdiction is predicated on 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

In a suit seeking disclosure of documents under the Freedom of Information Act (5 U.S.C. §552), may a District Court grant summary judgment for the agency defendant pursuant to Exemption 4 (§552(b)(4)) solely upon the basis of its sua sponte, in camera inspection of the documents?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 5

§552. Public information; agency rules, opinions, orders, records, and proceedings

* * * * * *

(b) This section does not apply to matters that are - . . .
(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

* * * * * *

STATEMENT OF THE CASE

On February 7, 1975 the Environmental Protection Agency ("EPA") issued Request for Proposal #DU-75-B093 inviting proposals for development of a continuous hydrogen sulfide (H_2S) monitoring system. The Request for Proposal advised prospective bidders that information submitted would be subject to disclosure to the public pursuant to the Freedom of Information Act unless designated by the bidder as confidential information.

Orion Research Incorporated ("ORION") submitted a Technical Proposal, as did twelve other bidders. Of the thirteen submitted bids, three, including those of ORION and Meloy Laboratories, Inc. ("MELOY") were determined by the EPA to be in

the competitive range. These three bidders submitted revised technical and cost proposals. Although ORION was "low bidder", ORION'S revised Technical Proposal was found to be "technically unacceptable", and the contract was awarded to MELOY on June 30, 1975.

On August 11, 1975, ORION requested from the EPA a copy of the Technical Proposal submitted by MELOY. ORION'S request was denied on September 24, 1975 by E. T. Rhodes, the EPA Deputy Assistant Administrator. An appeal from this decision was similarly denied on December 19, 1975 by Robert V. Zener, EPA General Counsel. The EPA furnished ORION only the cover sheets of the Meloy Technical Proposal, consisting of the

cover page, table of contents,[1] and a brief description of the MELOY H_2S monitor. The EPA withheld the remainder.

ORION filed suit in the United States District Court for the District of Massachusetts on December 10, 1975 under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552 to compel disclosure of the Meloy Technical Proposal.[2] The District Court's jurisdiction was based on 5 U.S.C. §552 (a)(4)(B). ORION moved for summary judgment on May 14, 1976.

On July 13, 1976, the EPA published an Amendment to Solicitation

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[1]The contents page indicated the Meloy proposal contained such information as: 1) "Program Schedule"; 2) "Experience and Facilities"; and 3) "Personal Qualifications".

No. DU-76-B286 seeking proposals for the field evaluation of MELOY'S hydrogen sulfide H_2S monitoring system developed pursuant to the contract awarded to MELOY in connection with FRP #DU-75-B093. In light of this disclosure, ORION submitted an affidavit that the Amendment disclosed a System Design Report of the very same MELOY H_2S monitor which was the subject of MELOY'S Technical Proposal. (Affidavit of Dr. James W. Ross, Jr.).

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[2]ORION also sought to compel disclosure of several intra-agency documents withheld under Exemption 5 (5 U.S.C. §552(b)(5)). This District Court granted summary judgment to the EPA with respect to most of these documents, and the Court of Appeals for the First Circuit affirmed. ORION does not seek review of the Exemption 5 issues in this Petition for Certiorari.

On or about March 15, 1978, The district court ordered that an oral hearing be held on Orion's Motion for Summary Judgment for April 6, 1978. On April 5, 1978, the EPA filed a cross motion for summary judgment alleging that the Technical Proposal was confidential information exempt from disclosure under 5 U.S.C. §552(b)(4) (Exemption 4). In support of its motion, the EPA submitted the affidavit of William E. Mathis, Director of EPA'S Contracts Management Division, dated July 13, 1976 (the "Mathis affidavit").

The Mathis affidavit consisted of: (1) a brief description of the documents; (2) Director Mathis' unqualified and conclusory opinion that future proposers would withhold relevant information from their Technical Proposals if they were

disclosed (or refuse to submit proposals entirely); and (3) his unqualified and conclusory opinion that disclosure would impair EPA information-gathering.

On September 25, 1978, the District Court, sua sponte, ordered the EPA to submit the withheld documents for in camera inspection. The EPA submitted the documents on October 5, 1978.

On June 15, 1979, the District Court (Freedman, J.) granted summary judgment to the EPA with respect to the Meloy Technical Proposal. In its decision, the Court disclaimed reliance on the Mathis affidavit:

> Specifically, the [Mathis] affidavit fails to "show affirmatively that the affiant is competent to testify to matters stated therein"[7] and, it is conclusory rather than a recitation of facts that would be admissable in evidence.

[7] For example, Mathis fails to indicate how long he has served in the capacity of Director of the EPA's Contract Management Division. The Court, therefore, is unaware of the number of years of experience he has. Furthermore, regardless of his tenure, Mathis would be incompetent to testify regarding what other firms would do if Meloy's proposal was disclosed. The government could have offered here affidavits from some of the thirteen firms that submitted proposals. They would, of course, be competent to testify as to what their reaction and future response would be.

After rejecting the Mathis affidavit however, the Court held, on the basis of its sua sponte in camera inspection, that the Meloy Technical Proposal came "within the purview of Exemption 4":

> The information contained in [the Meloy] technical proposal comes within the purview of Exemption 4. If the EPA were ordered to disclose this plan or others like it, its "ability to obtain necessary information in the future" would be impaired.

(5)

See National Parks v. Morton, supra at 770.

> For the EPA to effectively select the most deserving proposal for any contract award, it must be furnished with candid and original bids. If forced to disclose information like that contained in Meloy's proposal, the EPA's chances of receiving those types of bids in the future would be substantially diminished. Competing firms would be less likely to include novel ideas in their responses to solicitation for fear that their confidentiality requests would not be honored and competitors would get the benefit of their innovative theories. This, of course, would adversely effect the EPA's chances of awarding the contract to the most deserving firm.

On appeal to the First Circuit, the Court of Appeals rubber stamped the opinion of the district court by adopting it at slip opinion p. 5. Thereupon, it cursorily affirmed its decision by holding that it "committed no error of law or abuse of discretion," slip opinion p.6.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW RAISES SUBSTANTIAL POLICY QUESTIONS CONCERNING GOVERNMENT CONTRACT BIDDING AND THE PUBLIC'S RIGHT TO SCRUTINIZE THE GOVERNMENT AWARDS TO PRIVATE ENTERPRISE

The Supreme Court has never considered the substantive merits of Exemption 4 of the Freedom of Information Act. Yet Exemption 4's importance is shown by the large number of FOIA and reverse FOIA cases which raise Exemption 4 issues. See e.g., Note, Reverse FOIA Litigation; The Need For Congressional Action; 67 GEO. L.J. 103 (1978). The frequently cited construction of Exemption 4 in National Parks Conservation Association v. Morton 498 F. 2d 765 (D.C. Cir. 1974) has almost universally come to replace the text itself:

> [C]ommercial or financial matter is "confidential" for purposes of the exemption if disclosure of the info rmation is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

Equally important is the application of this construction to government contracting cases.

The instant case brings the construction of Exemption 4 and its application to government contracting into focus. More particularly, Orion was low bidder among thirteen private firms responding to the Government's Request for Proposals for the development of a continuous hydrogen sulfide monitor. Although it was "low bidder" the Government awarded the contract to another private firm, Meloy Laboratories. Shortly there-

after, the EPA refused Orion's request for a copy of Meloy's winning Proposal on the grounds that 1) Meloy had claimed its entire Proposal (including those sections labeled "Program Schedule, Experience and Facilities, and Personal Qualifications") was "confidential information"; 2) future proposers would withhold relevant information from future proposals if the Government released them after a contract award; and 3) disclosure would impair agency information gathering.

The burden of proving exemption under the FOIA is, of course, upon the Government. Hence, in the proceedings below, the EPA submitted an affidavit by William E. Mathis, Director of the agency's Contract Management Division. The District

Court however, rejected the Mathis affidavit as it failed to show that its affiant was competent to testify, that it did not recite facts, and that it was conclusory in nature. The Court also took note that Mathis was "incompetent" to testify as to what other private firms would do if Meloy's Proposal was disclosed, and that the government had not availed itself of the opportunity of submitting affidavits from some of the other firms that submitted proposals to show whether disclosure would discourage them from bidding on future government requests for proposals.

Notwithstanding the court's disclaimer of the only evidence submitted by the EPA, it concluded from its own sua sponte inspection of the Meloy Proposal, and as a matter

of law, that if government agencies were forced to disclose winning bid proposals, the agencies "chances of receiving those types of bids in the future would be substantially diminished". From this, the Court reasoned that Exemption 4 barred disclosure. Leaving aside the fact that such a holding precludes public scrutiny of government contract awards, and in particular the question of why the low bidder was not awarded the contract, the district court opinion conclusively rejects the possibility of Orion's proving that nondisclosure by government agencies discourage bidders from participating in the future, and particularly those whose lower bids were rejected. Clearly, this is an issue which affects thousands of

firms and their dealings with the Government, and one of national importance. As such it deserves plenary consideration by this Court.

We hasten to add on this issue that the district court's policy pronouncements are squarely in conflict with the decision in Shermco Industries v. Secretary of the Air Force, 452 F. Supp. 306 (N.D. Tex. 1978) wherein the Court held at p. 324 that bid proposals were exempt from disclosure under Exemption 4 prior to an agency's awarding of a contract, but subsequent to the agency's selecting a successful bidder, unsuccessful bid proposals must be disclosed. The conflict with the Shermco decision is accentuated in the instant case as the district court's policy holdings were made

with repsect to a contract award made almost four years prior thereto.[3] Accordingly, Orion submits that resolution of these decisions is an additional basis supporting this Court's grant of certiorari.

2. THE DECISION BELOW PRESENTS IMPORTANT PROCEDURAL ISSUES REGARDING THE ADMINISTRATION OF FOIA CASES DEALING WITH EXEMPTION 4 ISSUES.

The burden of proving information exempt under the Freedom of Information Act is upon the government. Coextensive with this burden, is the Agency's obligation to produce sufficient material and information relative to the withheld documents "to permit the requesting party to present its case effectively", Mead

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[3]The EPA made its award to Meloy Laboratories on June 30, 1975. The district court rendered its decision on June 15, 1979, and the Court of Appeals affirmed on February 11, 1980.

Data Central, Inc. v. United States Department of the Air Force, 566 F. 2d 242, 251 (D.C. Cir. 1977), Vaughn v. Rosen 484 F. 2d 820 (D.C. Cir.) cert. denied 415 U.S. 977.

In the proceedings below, the district court disregarded the affidavit submitted by the government on the grounds that it did not recite facts, but rather was "conclusory" in nature, and secondly, that the affiant was not qualified to render an opinion on what effect disclosure would have on future bidding of contracts. Having excluded the only evidence submitted by the EPA, the district judge "concluded from the record that a trial on the merits of this matter would be a misuse of judicial economy". In light of this "conviction" the district court, sua sponte, called

"for an in camera inspection of the materials". On the sole basis of his inspection of the documents, the district court held that disclosure "would have a chilling affect on the willingness of Meloy or other potential bidders to submit proposals to the EPA".

Orion asserts that it was entirely inappropriate for the District Court, having found the EPA's director of contracts lacking in technical expertise, to have sua sponte examined the subject documents in camera and then forecast that future bidders would be inhibited by disclosure of the subject documents. Apart from this fact, the District court was undoubtedly unqualified to render a technical opinion. The District Court procedure short-circuited the adversary process.

Orion was never given the opportu-- nity to present its case effectively because the EPA's affidavit was insufficient, and because it was unable to view the documents. Further, Orion never had the opportunity to examine the EPA's expert witness as it would have if the District Court had denied the EPA's motion for summary judgment. Similarly, Orion never had the opportunity to cross examine the district judge to test the validity of his technical opinion.

Orion maintains that final decisions made solely on the basis of in camera inspections are not appropriate in FOIA cases turning on Exemption 4. More specifically, there were several alternatives available to the District Court. It

could have appointed a Master (FRCP 53(b)) with technical expertise to review and evaluate the withheld documents. It could have invited Orion's outside counsel of record to examine the documents pursuant to suitable protective order (FRCP 26(c)(7)), a technique commonly utilized in trade secret cases. Alternatively, of course, it could simply deny the EPA's motion for summary judgment whereby Orion would have had the opportunity to cross examine the EPA's "say so" witnesses at trial.

Indeed, in a case squarely in point with the instant case, the Court of Appeals for the D. C. Circuit held that summary judgment should not be granted solely on the basis of opinion affidavits alleging

competitive harm. National Association of Government Employees v. Campbell, 593 F. 2d 1023, 1029-30 (D.C. Cir. 1978):

> The affidavits, for the most part, stated merely the conclusions of carrier officials that competitive harm would follow disclosure of the health insurance proposals, and did not supply evidentiary details to support those conclusions. Ofttimes com petitive injury is difficult to establish, and in determining whether such injury will ensue from premature release of the health insurance proposals the factfinder might well be summoned to "exercise its judgment in view of the nature of the materials sought and the competitive circumstances. . .relying at least in part on relevant and credible opinion testimony." But the opinion-evaluation thus necessitated is a task for which a summary judgment motion is ill-suited. The judicial function at that stage, we repeat, is not fact-finding, but rather an ascertainment of whether factfinding is essential to disposition of the litigation, and in no event is summary judgment appropriate unless the movant is entitled to victory as a matter of law.

The issue of whether Exemption 4 cases should be decided solely on sua sponte in camera inspections is common to FOIA cases. Since it addresses fundamental procedural issues of fairness in our adversary process, and in particular, to the administration of justice under the Freedom of Information Act, it deserves this Court's full consideration.

CONCLUSION

For the reasons set forth above, Orion research Incorporated requests this Court to issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the First Circuit.

Respectfully submitted,

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CONTENTS OF APPENDIX

Opinion of District Court for the District of Massachusetts (29 Pages)

Opinion of Court of Appeals for the First Circuit (7 Pages)

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

ORION RESEARCH INCORPORATED

v.

ENVIRONMENTAL PROTECTION AGENCY

CIVIL ACTION NO. 75-5071-F

MEMORANDUM

June 15, 1979

FREEDMAN, D.J.

This matter is before the court on cross-motions for summary judgment. Plaintiff Orion Research Incorporated ("Orion") seeks disclosure by defendent Environmental Protection Agency ("EPA") of documents relating to the solicitation of a proposal from and the award of a contract to Meloy Laboratories, Inc. ("Meloy"), a competing bidder on an EPA contract. Orion requests the documents pursuant to the

provisions of the Freedom of Information Act, 5 U.S.C. 552, et seq. ("FOIA").[1] The EPA resists disclosure asserting that the documents in question come within the ambit of Exemptions 4 and 5 of the FOIA, 5 U.S.C. 552 (b) (4) and (5).

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[1] Jurisdiction is conferred upon this court by 552 (4)(B) which provides: On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter do novo and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

In Thyssen Plastik Anger KG v. Induplas, Inc., 576 F. 2d 400 (1st Cir. 1978), the First Circuit instructed that the purpose of the summary judgment procedure is "to pierce formal allegations of facts in the pleadings..., Schreffler v. Bowles, 153 F. 2d 1, 3 (10th Cir. 1946), and to determine whether further exploration of the facts is necessary. Briggs v. Kerrigan, 431 F.2d 967, 968 (1st Cir. 1970)." 576 F.2d 400 at 401, quoting Hahn v. Sargeant, 523 F.2d 461, 464 (1st Cir. 1975). Having considered the pleadings, affidavits, memoranda and pertinent authorities, I find that there is no genuine issue as to any material fact here.[2] See 6 Moore's Federal Practice, 56.11 (1.-2) at 200. Accordingly, further exploration of the facts is not necessary and the case is properly before this Court on the cross-

motions for summary judgment. See 6 Moore's Federal Practice, 56.15 (1.0-0) at 391; accord, William J. Kelly Co. v. MV Sandpiper, 172 F.2d 865 (1st Cir. 1949).

In December 1974, the EPA's Contract Management Division was petitioned by its Environmental Sciences Research Laboratory to obtain the development of a H_2S Source Monitoring System for use in analyzing the hydrogen sulfide content of gases generated by petroleum

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[2]The only factual matters in dispute concern the EPA's procedural handling of Orion's requests. These are not issues of material facts in that the issue here is whether the documents were improperly withheld under Exemptions 4 or 5. See Hahn v. Sargeant, 523 F.2d 461, 464 (1st Cir. 1975).

refineries.[3] An invitation to submit proposals for the desired system was sent to 85 firms in February 1975. Orion and Meloy were among the 13 firms who responded to the invitation by seasonable submitting technical proposals.

In March 1975, James Homolya, designated by the Research Laboratory as the Monitoring System Project Officer, was asked to evaluate the proposals. After receiving Homolya's report, Vincent Mason, the Contracting Officer, determined that the "competitive range" (those firms who, on the basis of their technical proposals, stood a reasonable chance to be awarded

[3]Request for Proposal Number DU 75-B093.

the contract) consisted of three firms: Orion, Meloy and Versar, Inc.

Representatives of Orion and Meloy met separately with EPA officials and were asked to formulate revised technical proposal for the monitoring system. The revised proposals were again referred to Homolya. On May 17, 1975, Homolya notified Betty Peoples, the designated contract negotiator, that Orion's proposal was technically unacceptable.[4] Negotiations with Meloy and Versar, Inc. continued and a contract was ultimately awarded to Meloy on June 30, 1975. Notified of the award to Meloy, Orion requested and received a "debriefing" concerning the selection process on July 23, 1975.

By letter dated August 7, 1975, Orion asked the EPA for a copy of the

"Technical Approach and Work Plan" submitted by Meloy, the successful bidder. The letter was received by the EPA's Freedom of Information Officer on August 11, 1975 and assigned Request Identification Number RIN-385-17. On September 24, 1975, E.T. Rhodes, EPA Deputy Assistant Administrator for Administration, denied Orion's request citing

[4]Homolya's determination that the revised proposal was technically unacceptable effectively reduced the competitive range to two firms, Meloy and Versar, Inc. It appears that Orion's disagreement with the determination resulted in the requests for documents, requests whose denials prompted the filing of this suit.

as justification Exemption 4. Orion took a timely appeal from the negative determination. Robert Zener, EPA General Counsel, denied the appeal on December 19, 1975.

In a letter addressed to Peoples dated August 22, 1975, Orion made a second request to the EPA for " (a) copy of the evaluation plan and the report of the evaluation committee" and "(a)ll relevant Agency memorand contemporaneous with or subsequent to the award of this contract... indlud(ing), but not limited to, memoranda in connection with, or justifying, the award of the contract." This request was received on August 29, 1975 and given number RIN-425-75. Rhodes denied the request on october 3, 1975. Orion's appeal of this

determination was denied by Zener who found that the documents were covered by Exemption 5.[5]

Orion filed a third request for disclosure on September 30, 1975. The letter, received by the EPA on October 15, 1975 and assigned number RIN-563-75 requested:

1. Additional information and cover letter from Meloy....to EPA... which information is made reference to in a letter from Burton Levy to Orion.....

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[5]Zener did agree that the evaluation plan, the scoring system used to evaluate the technical proposals, was not exempt and should be disclosed to Orion.

2. Any and all correspondence between EPA...and Meloy...between June 1, 1975 through september 29, 1975, including, but not limited to, all correspondence relating to Meloy's claim of confidentiality.

3. All correspondence between EPA, Freedom of Information Officer, his agents and servants, General Counsel for the EPA, his assistants, agents and servants, the Deputy Assistant Administrator for Administration, his agents and servants, in the first part, and Meloy... their attorneys, agents and servants, in the second part, between August 7, 1975 and September 29, 1975.

4. Any and all "inter agency memorandums," "final decisions," "final decisions," contemporaneous and "post-decisional" memoranda from June 29, 1975 through September 29, 1975 justifying, relating to, or explaining, the award to Meloy... of Solicitation Number DU-75-B093.

Rhodes notified Orion on November 12, 1975 that the document requests set forth in paragraphs 1, 2 and 3 were repetitive; they had been previously asked for, considered and denied. With respect to the documents described in paragraph 4, Thodes resisted disclosure pursuant to Exemption 5.

Subsequently, on December 10, 1975 Orion filed this action seeking a de novo determination of its asserted right

to the disclosure of the documents withheld by the EPA.

II

It is well-settled that the exemptions set forth in the FOIA must be narrowly interpreted, see Charlotte Mecklenberg Hospital Authority v. Perry, 571 F.2d 195 (4th Cir. 1978); Vaughn v. Rosen, 484 F. 2d 880 (D.C. Cir. 1973;) Bristol-Myers Company v. Federal Trade Commission, 424 F. 2d 935 (D.C. Cir. 1970). Moreover, the agency seeking to withhold the information has the burden of showing that the documents are covered by one of the nine exemptions. EPA v. Mink, 410 U.S. 73, 79 (1972). In the case at bar, the EPA has relied upon Exemptions 4 and 5 as authority for esisting the disclosure of the documents sought by Orion.

Exemption 4 provides: "(t)his section does not apply to matters that are trade secrets and commercial or financial information obtained from a person and privileged or confidential." In National Parks v. Morton, 498 F 2d 765 (D.C. Cir. 1974), the D.C. Circuit, while considering whether the Department of the Interior could refuse to disclose certain agency records, formulated a test to be applied when determining whether a matter is confidential within the meaning of this exemption:

> ...commercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

498 F 2d at 770. In order to meet this test with respect to documents withheld under this exemption, the EPA must demonstrate that the disclosure of the requested materials would either impede the "ability to obtain necessary information in the future" or cause Meloy "substantial harm to its competitive position."[6]

Exemption 5 reads: "(t)his section does not apply to inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." In EPA v. Mink, supra the Supreme Court considered this exemption.

This language clearly contemplates that the public is entitled to all such memoranda or letters that a private party could discover in litigation with the agency. Drawing such a line between what may be withheld and what must be disclosed is not without difficulties..... Still, the legislative history of Exemption 5 demonstrates that Congress inteded to incorporate generally the recognized rule that "confidential intra-agency advisory opinions...are privileged from inspection." Kaiser Aluminum & Chemical Corp. v. United States, 141 Ct. Cl. 38, 49, 157 F. Supp. 939, 946 (1958) (Reed, J.).... But the privilege that has been held to attach to intragovernmental memorada clearly has finite limits, even in civil litigation. In each case,

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[6]In Morton, the documents requested clearly contained commercial or financial information; were obtained from a person and, were not privileged. The issue therefore was whether the information could be termed "confidential" within the meaning of the exexemption. 498 F. 2d at 766. The same is true in the case at bar.

> the question was whether production of the contested document would be "injurious to the consultative functions of government that the privilege of nondisclosure protects." Kaiser Aluminum & Chemical Corp., supra at 49, 157 F.Supp., at 946. Thus...memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the government.

410 U.S. at 86-8; see Herbert v. Lando, No. 77-1105, slip op, (Sup. Ct. April 18, 1979)(Dissent). The court recognized the distinction between "materials reflecting deliberative or policy-making processes" and materials consisting of "purely factual, investigative matters," EPA v. Mink, supra at 89. Documents in the former category would be exempt while those in the latter would have to be disclosed. In order to sustain its burden with respect to those documents

withheld pursuant to Exemption 5 then, the EPA must show that disclosure would be "injurious to the consultative functions of government" in that the documents consist only of "confidential intra-agency advisory opinions" and that any purely factual material is not "severable from its context."

It is against this background that I considered the pleadings and affidavits in order to determine whether either Orion or the EPA has demonstrated that it is entitled to judgment as a matter of law see 6 Moore's Federal Practice, 56.13 at 341.

III

In support of its motion for summary

Judgment, the EPA has offered an affidavit from William E. Mathis, Director of its Contract Management Division. I find Mathis' affidavit to be lacking with respect to some of the requirements of Rule 56(e), F.R. Civ. P. Specifically, the affidavit fails to "show affirmatively that the affiant is competent to testify to matters stated therein"[7] and, it is conclusory rather than a recitation of facts that would be admissable in evidence.

Having found the Mathis affidavit deficient in those respects, I ordered that the documents requested be produced to this court for an in camera inspection. The production of the documents has enabled the Court to decide whether the affiant's failure to establish that they reflect "deliverative or policy-making processes" EPA v. Mink,

supra at 89, or that they consist of only "confidential intra-agency advisory opinions" Kaiser Aluminum & Chemical Corp. v. United States, 141 Ct. Cl. 38, 49, 157 F. Supp. 939, 946 (1958), "Stemmed from mere inadvertence or from a truly overbroad reading of the exemption(s) from the agency" Irons v. Bell, No. 78-1350, slip op. at 6, fn. 6 (1st Cir. March 27, 1979).

IV

Meloy's Technical Proposal

The information contained in this technical proposal comes within the

[7]For example, Mathis fails to indicate how long he has served in the capacity of Director of the EPA's Contract Management Division. The Court, therefore is unaware of the number of years of experience he has. Furthermore, regardless of his tenure, Mathis would be incompetent to testify regarding what other firms would do if Meloy's proposal was disclosed. The government could have offered here affidavits from some of the thirteen firms that submitted proposals. They would, of course, be competent to testify as to what their reaction and future response would be.

perview of Exemption 4.[8] If the EPA were ordered to disclose this plan or others like it, its "ability to obtain necessary information in the future" would be impaired. See National Parks v. Morton, supra at 770.

For the EPA to effectively select the most deserving proposal for any contract award, it must be furnished with candid and original bids. If

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[8]Orion charges that Meloy had tendered substantially the same proposals before in a patent application. This Court makes no finding either way with regard to that charge except to note that, if true, Orion would not be prejudiced by judgment against it here with respect to Meloy's technical proposal; it would already have access to the plan.

forced to disclose information like that contained in Meloy's proposal, the EPA's chances of receiving those types of bids in the future would be substantially diminished. Competing firms would be less likely to include novel ideas in their responses to solicitation for fear that their confidentiality requests would not be honored and competitors would get the benefit of their innovative theories. This, of course, would adversely effect the EPA's chances of awarding the contract to the most deserving firm.

Moreover, disclosure of this and similar successful proposals would enable competing firms to emulate features common to the plans selected. It should be apparent that the practice would impair the agency's capacity to

make informed choices on future contracts.

Evaluation of Technical Proposals (April 1, 1975)

I find that this information is covered by Exemption 5. The memorandum consists of synopses by Homolya of the technical proposals submitted to the EPA. Homolya describes in general terms principal features of the contractor's plan for the H_2S monitoring system, advises Peoples whether or not the proposal is technically acceptable and, in some cases recommends that further information be obtained from the contractor. Clearly, this document is comprised of "confidential intra-agency advisory opinions." Kaiser Aluminum & Chemical Corp., supra, and is therefore exempt from disclosure.

However, the two-page evaluation plan itself is not exempt from disclosure; it should be disclosed if it has not already been made available to Orion.

Review of Langston Laboratories' Proposal
(April 16, 1975)

This memorandum is similar in nature and content to "Evaluation of Technical Proposals" discussed earlier. Here too, Homolya gives his opinion concerning the acceptability of the proposal in question. Accordingly, I find that this material is also covered by Exemption 5.

Competitive Range Determination

This memorandum is compiled over the signature of the Contracting Officer, Mason. It is a final determination

that the competitive range, for purposes of negotiation over the contract award, consists of three firms: Meloy, Orion and Versar, Inc. It cannot be construed in any light merely as an advisory opinion. I cannot comprehend how disclosure of the information contained in this memorandum could be "injurious to the consultative functions of government that the privilege of nondisclosure protects." Kaiser Aluminum & Chemical Corp., supra at 49, 157 F.Supp. at 946.

Review of Modified Technical Proposals (May 17, 1975)

This document consists of Homolya's opinions relative to the modified proposals submitted by the three firms that made up the competitive range.[9] I find it to be covered by Exemption 5. This

type of memorandum would not be availa--able to a party not in litigation with the EPA. See EPA v. Mink, supra.

Review of Cost Proposal Submitted by Meloy
(May 23, 1975)

The information contained in this memorandum is covered by Exemption 5. The documents consist of critical evaluation of the recommendations concerning the reasonableness of Meloy's cost proposal.

Profit/Fee Objectives
(July 29, 1975)

I can find no advisory or deli-

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[9]Orion's continuous argument that Homolya's reports constitute final determinations is not well taken. The records show that Homolya was asked to evaluate the proposals. Having done so, he reported his findings and recommendations. The fact that his findings were adopted by Peoples or Mason does not elevate his advice to the status of a mandate.

berative material contained in the completed form and it does not, therefore, come under Exemption 5. Nor does it come within Exemption 4. Knowing that the EPA scrutinizes fees with this type of intensity can only assist the agency to obtain conservative fee requests in the future.

Record of Procurement Action

It is admitted that this memorandum, in part, consists of purely historical fact. Since this historical fact is severable from its context, see EPA v. Mink, supra, it must be disclosed. The initial two pages are, therefore, not exempt from disclosure to Orion. The balance of the document (three pages), however, is comprised of advisory opinions and need not be produced; it is covered by Exemption 5.

Cost Advisory Report
(July 14, 1975)

This memorandum is a report from Albert King, Chief of the EPA's Cost Advisory Branch, to Peoples concerning Meloy's cost proposal. It clearly consists of a recommendation; an intra-agency advisory opinion. While there is evidence of some compilation of factual material here also, I found that it is not severable from its context, see EPA v. Mink, supra at 88. Accordingly, I find that the material contained in this document comes within the ambit of Exemption 5.

V

To summarize, I found the affidavits offered in this case to be inconclusive on the issue of whether the withheld documents came within the coverage of Exemptions 4 or 5 of the

FOIA. However, I concluded from the record that a trial on the merits of this matter would be a misuse of judicial economy. This conviction, coupled with the realization that the legal issue of the applicabilty of the exemptions depended in large part upon the factual nature of the contents of the documents, see Irons v. Bell, supra, prompted an Order calling for an in camera inspection of the materials.

By virtue of that inspection, I have determined that the documents withheld by the EPA are exempt from disclosure by Exemption 4 and/or Exemption 5, subject to the following exceptions:

1) the two-page memorandum entitled "Competitive Range Determination,"

2) one-page document captioned "Profit/Fee Objectives," and

3) The first two pages of a five-page memorandum entitled "Record of Procurement Action."

These specifically described documents contain information that is not exempt from disclosure under any provision of the FOIA; they should be provided to Orion.

An appropriate Order shall enter in accordance with this memorandum.

Signed: Frank H. Freedman
United States District Judge

United States Court of Appeals
For the First Circuit

No. 79-1293

ORION RESEARCH INCORPORATED,

PLAINTIFF, APPELLANT,

v.

ENVIRONMENTAL PROTECTION AGENCY,

DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. FRANK H. FREEDMAN, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
ALDRICH, *Circuit Judge*,
BONSAL,* *Senior District Judge*.

Robert W. Hagopian, with whom *John Stopa* was on brief, for appellant.

John D. Hanify, Assistant United States Attorney, with whom *Edward F. Harrington*, United States Attorney, was on brief, for appellee.

February 11, 1980

BONSAL, *District Judge*. On December 10, 1975, Plaintiff-Appellant, Orion Research Incorporated ("Orion"), instituted this action pursuant to the Freedom of Information Act, 5 U.S.C. §552 ("FOIA"), to enjoin Defendant-Appellee, the Environmental Protection Agency, ("the EPA") from withholding from it certain documents it had requested. Both sides moved for summary judgment. Following its *in camera* inspection, the district court ordered the

* Of the Southern District of New York, sitting by designation.

EPA to furnish to Orion certain of the documents or portions thereof requested by Orion and determined that the remaining documents or portions thereof were exempt from disclosure pursuant to Exemptions 4 and 5 of the FOIA, 5 U.S.C. §§ 552(b)(4) and (b)(5). Orion appealed. We affirm.

In February 1975, the EPA's Contract Management Division invited eighty-five firms to submit technical proposals for the development of a Hydrogen Sulfide Source Monitoring System to analyze the hydrogen sulfide content of gases generated by petroleum refineries. Thirteen firms, including Orion, submitted technical proposals. In March 1975, James Homolya, the Monitoring System Project Officer, forwarded a report to Vincent Mason, the Contracting Officer, evaluating these proposals, concluding that three firms—Orion; Meloy Laboratories, Inc. ("Meloy"); and Versar, Inc.—were in the "competitive range." Thereafter, Orion and Meloy submitted revised technical proposals, which were referred to Homolya. In May 1975, Homolya informed Betty Peoples, the contract negotiator, that Orion's proposal was technically unacceptable, and on June 30 the contract was awarded to Meloy.

Pursuant to the FOIA, Orion requested the EPA to furnish it with a number of documents, including the evaluation plan used by the EPA to score the technical proposals, the Meloy Technical Proposal, and various intra-agency memoranda.

The EPA furnished to Orion the evaluation plan, but withheld the remaining documents, citing Exemption 4 with respect to the Meloy Technical Proposal and Exemption 5 with respect to the intra-agency memoranda.

On December 10, 1975, Orion instituted this action to require the EPA to deliver the remaining documents, and on May 14, 1976, moved for summary judgment. On April

5, 1978,[1] the EPA cross moved for summary judgment, relying on the affidavit of William E. Mathis, Director of the Contract Management Division of the EPA, sworn to July 13, 1976 ("the Mathis affidavit"). On September 25, 1978, the district court ordered the withheld documents produced for *in camera* inspection, together with an index correlating each withheld document with the exemptions claimed. Following its *in camera* inspection, the district court directed the EPA to furnish certain documents, or portions thereof, and found the Meloy Technical Proposal and certain intra-agency memoranda, or portions thereof, exempt from disclosure. Orion appealed.

Orion contends that for purposes of summary judgment, the EPA did not satisfy its burden of proving that there is "no genuine issue as to any material fact." Fed.R.Civ.P. 56(c); *see Hahn* v. *Sargent*, 523 F.2d 461 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976). It is true that the district court found the Mathis affidavit, relied on by the EPA to support its cross motion for summary judgment, "to be lacking with respect to some of the requirements of Rule 56(e), F.R.Civ.P."[2] *Orion* v. *Environmental Protection Agency*, No. 5071, slip op. at 7 (D. Mass. June 15, 1979). However, the district court ordered the EPA to produce the documents for *in camera* inspection, together with an

[1] There is no explanation in the record as to why the EPA's cross motion was filed almost two years after Orion's motion for summary judgment.

[2] The district court stated that the affidavit does not " 'show affirmatively that the affiant is competent to testify to matters stated therein,' " *Orion* v. *Environmental Protection Agency*, No. 75-5071, slip op. at 8 (D. Mass. June 15, 1979) (quoting Fed.R. Civ.P. 56(e)), and that the affidavit is conclusory, failing to set forth facts that would be admissible in evidence. Specifically, the district court found that the affidavit failed to state how long the affiant had been director of the EPA's Contract Management Division and that the affiant was incompetent to testify regarding what other firms would do if the Meloy Technical Proposal were disclosed. *Orion, supra* at 7-8 & n. 7.

index correlating each withheld document with the exemptions claimed. *See Irons* v. *Bell*, 596 F.2d 468 (1st Cir. 1979).

Orion further contends that the evidence offered by the EPA did not satisfy its FOIA burden of proving that the withheld material is exempt from disclosure. The FOIA does provide that an agency has the burden of proving that withheld material falls within an FOIA exemption. 5 U.S.C. §552(a)(4)(B). To satisfy this burden, the agency must furnish a detailed description of the contents of the withheld material and of the reasons for nondisclosure, correlating specific FOIA exemptions with relevant portions of the withheld material. *National Parks and Conservation Ass'n* v. *Kleppe*, 547 F.2d 673 (D.C. Cir. 1976); *Pacific Architects and Engineers, Inc.* v. *Renegotiation Board*, 505 F.2d 383 (D.C. Cir. 1974); *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); *Cuneo* v. *Schlesinger*, 484 F.2d 1086 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). Such a description is necessary since the party seeking disclosure does not know the contents of the withheld material whereas the agency has access to the material. The description furnished by the agency therefore must be sufficiently detailed "to permit the requesting party to present its case effectively," *Mead Data Central, Inc.* v. *United States Department of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977), but it need not "contain factual descriptions that if made public would compromise the secret nature of the information." *Vaughn, supra* at 826.

Here, the EPA submitted the Mathis affidavit and an index, that, taken together, describe the contents of the withheld material and explain the reasons for nondisclosure, correlating specific exemptions to disclosure under the FOIA with relevant portions of the withheld material. Upon reviewing the Mathis affidavit, we find that it, in conjunction with the index and the district court's *in camera* inspection of the documents themselves, satisfied the EPA's burden of proof. *See Irons* v. *Bell*, *supra*.

THE MELOY TECHNICAL PROPOSAL

The district court found that the Meloy Technical Proposal was exempt from disclosure pursuant to Exemption 4, which applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. §552(b)(4). The district court stated:

> "If the EPA were ordered to disclose this plan or others like it, its 'ability to obtain necessary information in the future' would be impaired. *See National Parks* [*Conservation Association* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)].
>
> "For the EPA to effectively select the most deserving proposal for any contract award, it must be furnished with candid and original bids. If forced to disclose information like that contained in Meloy's proposal, the EPA's chances of receiving those types of bids in the future would be substantially diminished. Competing firms would be less likely to include novel ideas in their responses to solicitation for fear that their confidentiality requests would not be honored and competitors would get the benefit of their innovative theories. This, of course, would adversely effect [*sic*] the EPA's chances of awarding the contract to the most deserving firm.
>
> "Moreover, disclosure of this and similar successful proposals would enable competing firms to emulate features common to the plans selected. It should be apparent that the practice would impair the agency's capacity to make informed choices on future contracts." *Orion, supra* at 8-9.

We reject Orion's contention that the EPA must offer extrinsic evidence as to the effect disclosure of the Meloy Technical Proposal would have on potential bidders. The agency is in the best position to determine the effect of disclosure on its ability to obtain necessary technical in-

formation. Moreover, the involvement in litigation of firms submitting proposals could well deter them from providing information to the EPA in the future. This is not to say that the mere conclusory say-so of an agency that its ability to acquire information would be impaired will suffice. But where the conclusion is plausibly supported in some detail, as it is here by the continuing need for eliciting ideas of both a technical and novel nature, we will not require more.

We therefore hold that the district court committed no error of law or abuse of discretion in finding that disclosure of the Meloy Technical Proposal to a competitor of Meloy would have a chilling effect on the willingness of Meloy or other potential bidders to submit proposals to the EPA. These proposals may contain information a firm would not want disclosed to its competitors. As the district court pointed out, fear of disclosure would induce potential bidders to submit proposals that do not include novel ideas. Accordingly, we find that the Meloy Technical Proposal is exempt from disclosure under Exemption 4.

THE INTRA-AGENCY MEMORANDA

The intra-agency memoranda were found by the district court to be exempt pursuant to Exemption 5, which applies to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. §552 (b)(5). This exemption was enacted to free decision makers from "the threat of cross-examination in a public tribunal," *Ackerly* v. *Ley*, 420 F.2d 1336, 1341 (D.C. Cir. 1969). The exemption does not apply to purely factual material, *EPA* v. *Mink*, 410 U.S. 73, 87-88 (1973); *Schwartz* v. *IRS*, 511 F.2d 1303, 1305 (D.C. Cir. 1975), or final memoranda that "represents policies, statements or interpretations of law that the agency has actually adopted." *Schwartz*, *supra*

at 1305; *see NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975).

Orion contends that the four memoranda written by Homolya to Mason or Peoples were final memoranda if Homolya had decisional authority. However, Orion offered no evidence rebutting the EPA's contention that Mason, the contracting officer, not Homolya, had decisional authority and that the four intra-agency memoranda were prepared by Homolya for the purpose of advising Mason. Orion speculates that Mason may have been a rubber stamp for Homolya, in which event Homolya would have made the final decision and his memoranda would not be exempt under Exemption 5.[3] To indulge in such speculation would permit every FOIA plaintiff to roam in the bureaucratic pasture to determine the ratings of the bureaucrats and which ones had decisional authority so as to avoid Exemption 5.[4]

Orion contends that two of the intra-agency memoranda contain factual and post-decisional material that must be disclosed if severable. The district court's finding that these documents or portions thereof are exempt from disclosure was based on its *in camera* inspection of the documents as well as on the Mathis affidavit.

The decision of the district court is affirmed.

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[3] It should be noted that, "[w]hile . . . the [party opposing a summary judgment motion] is entitled to all favorable inferences, he is not entitled to build a case on the gossamer threads of whimsey, speculation and conjecture." *Hahn* v. *Sargent*, *supra* at 467 (quoting *Manganaro* v. *Delaval Separator Co.*, 309 F.2d 389, 393 (1st Cir. 1972)).

[4] The sole authority for appellant's argument that "de facto final opinions" do not fall within Exemption 5 is *Kent Corp.* v. *NLRB*, 530 F.2d 612 (5th Cir. 1976) (dictum). We need not decide whether we would endorse this exception to Exemption 5, since summary judgment was appropriate, even applying the law most favorable to appellant.

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No. 79-1888

In the Supreme Court of the United States

OCTOBER TERM, 1979

ORION RESEARCH, INC., PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that a district court may not grant summary judgment for a government agency pursuant to Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4),[1] solely on the basis of an in camera inspection of the requested documents.

1. In this Freedom of Information Act (FOIA) suit, petitioner seeks to compel disclosure by the Environmental Protection Agency (EPA) of documents concerning the solicitation and award of a contract to one of petitioner's competitors. Petitioner submitted a

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[1] 5 U.S.C. 552(b)(4) provides in pertinent part:

> This section does not apply to matters that are—
>
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential[.]

technical contract proposal in response to an invitation for bids from EPA. Thirteen proposals were submitted, but only three were deemed to be in the competitive range (Pet. App. 5). Those three firms, including petitioner, were requested to submit revised proposals prior to a final contract determination. The contract was awarded to Meloy Laboratories, Inc., after petitioner's proposal was found to be technically unacceptable (Pet. App. 6).

Pursuant to the FOIA, petitioner requested copies of the Meloy Technical Proposal, the plan used by EPA to evaluate proposals, and several intra-agency memoranda. EPA produced the evaluation plan, but denied the other requests, citing Exemptions 4 and 5 of the FOIA, 5 U.S.C. 552(b)(4), (b)(5) (Pet. App. 6-11).

Petitioner brought suit in the United States District Court for the District of Massachusetts to compel production of the withheld documents. The district court, after examining the documents and an accompanying index and affidavit submitted by EPA, determined that certain documents or portions of documents should be produced (Pet. App. 28-29). However, it granted EPA's motion for summary judgment with regard to the remaining documents. Specifically, the court held that the Meloy Technical Proposal need not be disclosed under Exemption 4 because compelled disclosure of technical proposals of this nature would have a chilling effect on EPA's ability to elicit "candid and original bids" (Pet. App. 19-22). Certain intra-agency memoranda were also held to be exempt under Exemption 5 (Pet. App. 22-27).

On appeal, petitioner contended that EPA had not produced sufficient evidence to warrant summary judgment in its favor. The court of appeals rejected the

claim, holding (Pet. App. 4a)[2] that (1) the affidavit of the director of EPA's Contract Management Division, (2) the detailed index describing the contents of the documents at issue and the reasons for particular exemption claims, and (3) the district court's in camera inspection of the documents provided a sufficient basis for the district court's determination that EPA had validly claimed an exemption for the documents. In affirming the decision upholding the Exemption 4 claim, the court of appeals explained (Pet. App. 6a) that it was not holding that "the mere conclusory say-so of an agency that its ability to acquire information would be impaired will suffice." Rather, the court held only that "where the [agency's] conclusion is plausibly supported in some detail, as it is here by the continuing need for eliciting ideas of both a technical and novel nature, we will not require more" (*ibid.*).

2. The court of appeals held that, on the facts of this case, the district court correctly granted summary judgment sustaining EPA's exemption claim for several specific documents. This narrow ruling does not warrant further review.[3]

Petitioner acknowledges (Pet. 12-13) that the established construction of Exemption 4 permits agency withholding of information where disclosure is likely, *inter alia*, "to impair the Government's ability to obtain necessary information in the future." *National Parks and*

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[2]The opinion of the court of appeals as reproduced in the appendix to the petition has page numbers that are not consecutive to those of the preceding appendix pages. We have added "a" following page references to that opinion to distinguish them from the first 29 pages of the appendix.

[3]Only the Exemption 4 determination is at issue here. Petitioner does not challenge the court of appeals' decision with respect to the application of Exemption 5 to certain intra-agency memoranda (see Pet. 7 n.2).

Conservation Ass'n v. *Morton*, 498 F. 2d 765, 770 (D.C. Cir. 1974). It contends, however, that it was error to uphold the EPA exemption claim on that ground because the district court found the agency official's affidavit deficient in some respects (Pet. 14-15), because the court thereupon based its determination solely on an in camera inspection of the documents (allegedly an error in any case involving Exemption 4) (Pet. 19-21), and because the insufficiency of EPA's affidavit and petitioner's inability "to view the documents" denied petitioner an adequate opportunity to "present its case effectively" (Pet. 21). These arguments are insubstantial.

The district court found that the affidavit's deficiencies made it inadequate, standing alone, to support EPA's motion for summary judgment. But the court of appeals, which made its own review of the affidavit (Pet. App. 4a), properly concluded that the affidavit, considered together with the documents at issue and with EPA's detailed index linking portions of the documents to particular exemption claims, did furnish an adequate basis for the district court's entry of summary judgment. The Exemption 4 determination thus does not rest "solely" on in camera inspection, as petitioner contends (Pet. 20).

Petitioner's suggestion (Pet. 21) that decisions upholding Exemption 4 claims may never be based on in camera inspection is frivolous. Congress added the provision in 5 U.S.C. 552(a)(4)(B) authorizing courts to "examine the contents of * * * agency records *in camera*" precisely because it saw this as a way of piercing conclusory agency claims (see H.R. Rep. No. 93-876, 93d Cong., 2d Sess. 7 (1974)), and courts customarily utilize in camera inspection when affidavits alone do not permit conclusive resolution of agency exemption claims. See, *e.g.*, *Baker* v. *CIA*, 580 F. 2d 664, 669 (D.C. Cir. 1978);

Maroscia v. *Levi*, 569 F. 2d 1000, 1003 (7th Cir. 1977); *Harvey's Wagon Wheel, Inc.* v. *NLRB*, 550 F. 2d 1139, 1143 (9th Cir. 1976). The court of appeals recognized (Pet. App. 6a), of course, that in some Exemption 4 cases a record of the sort relied on here would be insufficient to warrant summary judgment granting the exemption. But the district court's conclusion in this case (Pet. App. 20-22)—that the ability of an agency that is seeking innovative technology to receive "candid and original bids" would likely be impaired if original ideas contained in the bids were disclosed to competing bidders—hardly amounts to the type of technical judgment that might require an evidentiary hearing.[4]

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[4]In *National Association of Government Employees* v. *Campbell*, 593 F. 2d 1023 (D.C. Cir. 1978), on which petitioner relies (Pet. 23), the court was primarily concerned with the district court's resolution, on the basis of affidavits, of a dispute concerning the agency's attempt to show that disclosure of insurance carriers' proposals for health insurance plans would result in competitive harm. The significance of innovation in the field of insurance is much more problematic than its significance in the area of new technology. Moreover, as the court of appeals in the present case observed (Pet. App. 5a-6a), an "agency is in the best position to determine the effect of disclosure on its ability to obtain necessary technical information." An agency can less readily determine from its own experience whether competitors will actually be harmed by disclosures.

Petitioner's reliance (Pet. 17) on *Shermco Industries, Inc.* v. *Secretary of the Air Force*, 452 F. Supp. 306, 323-324 (N.D. Tex. 1978), is similarly misplaced. The Exemption 4 issue in that case concerned bidders' cost proposals that the Air Force maintained were confidential prior to the award of a contract. The district court's holding that they were not exempt because the contract in question had in fact been awarded (452 F. Supp. at 323-324) was reversed by the court of appeals, which held that no final contract award had been made. The court of appeals did not confront the question whether the Air Force could withhold bid proposals after the award had been made. 613 F. 2d 1314, 1316-1318 & n.7 (5th Cir. 1980).

Finally, there is no merit to petitioner's contention that the in camera inspection procedure followed by the district court deprived petitioner of an adequate opportunity to rebut EPA's submission in support of its Exemption 4 claims. Courts have recognized that FOIA plaintiffs are handicapped by their inability to see contested agency records, but an accepted means of alleviating the problem is to require the agency to submit an index describing the nature and contents of each document and correlating exemption claims with particular documents or parts thereof. *Irons* v. *Bell*, 596 F. 2d 468, 476 (1st Cir. 1979); *Mead Data Central, Inc.* v. *United States Dept. of the Air Force*, 566 F. 2d 242, 260-262 (D.C. Cir. 1977); *Vaughn* v. *Rosen*, 484 F. 2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). As the court of appeals noted (Pet. App. 3a-4a), such an index was supplied in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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ENVIRONMENTAL PROTECTION AGENCY,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner Orion Research Incorporated ("ORION") would like to inform the Court that the judgment for which review is sought has been reported (at 615 F. 2d 551) and, secondly, respond to three assertions made by respondent in its Memorandum in Opposition.

1. The Memorandum for the Respondent in Opposition (Mem. Opp.) states, at 4, "Petitioner's suggestion (Pet. 21) that decisions upholding Exemption 4 claims may never be based on in camera inspection is frivolous." This misstates ORION'S position. Orion maintains that final decisions made solely on the basis of sua sponte, in camera inspections, by the court alone, are not appropriate in FOIA cases turning on exemption 4. The difference is obvious.

2. Far from presenting a "narrow ruling" affecting only "the facts of this case" (Mem. Opp. 3), the case at bar presents typical issues that are likely to recur. To conserve judicial resources, a District Court judge is very likely to try to resolve an Exemption 4 case summarily upon in camera examination rather than undergo a lengthy trial to determine the extent of "competitive harm" and "chilling effect." Indeed, the District Court in the case at bar did that very thing, stating:

> . . .I concluded from the record that a trial on the merits of this matter would be a misuse of judicial economy. This conviction. . .prompted an Order calling for an in camera inspection of the materials. (Pet. App. 28)

This sequence of events is likely to recur in FOIA litigation, and not

only Exemption 4 cases. See, e.g., Military Audit Project v. Bush, 418 F. Supp. 876 (D.D.C. 1976) (Exemptions 1 and 3), in which the government "answered" a FOIA complaint by submitting the requested documents for in camera inspection and moving to dismiss. (The court refused the "offer" and denied the motion.) Thus the case at bar raises issues common to all FOIA litigation and deserves plenary review by the Supreme Court.

3. Respondent attempts (Mem. Opp. 5, n. 4) to distinguish National Association of Government Employees v. Campbell, 593 F. 2d 1023 (D.C.Cir. 1978) (N.A.G.E.) which ORION submits is squarely in point and contrary to the Court of Appeals decision below (Pet.

22). The purported ground of distinction is that N.A.G.E. involved information in the field of insurance while the case at bar involves "new technology".[1] Without delving into the relative commercial importance of innovation in insurance and chemistry,[2] it suffices to note that the N.A.G.E. opinion does not mention the characteristics of the insurance industry and that the judgment was in no way based on those characteristics.

The Court of Appeals for the D. C. Circuit's opinion in N.A.G.E. rigorously protects a FOIA plaintiff's right to an open trial. The Court of Appeals for

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[1]The respondent begs the question; one of the factual issues upon which ORION seeks a hearing is whether the Meloy Technical Proposal contains any "new technology" at all.

the First Circuit's opinion, however, affirms a summary judgment admittedly based on notions of "judicial economy." (Pet. App. 28). The conflict is undeniable and deserves resolution by this Court.

Respectfully submitted,

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[2]ORION notes, however, that the respondent's opinion that "The significance of innovation in the field of insurance is much more problematic..." (Mem. Opp. 5, n. 4) would be disputed by the insurance carrier intervenors who submitted contrary affidavits to the N.A.G.E District Court. (N.A.G.E., supra, at 1025).